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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

ROBERT P. HAGEN,
Petitioner,
v.
STATE OF UTAH,
Respondent.

On Writ of Certiorari to the Supreme Court of Utah

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE COUNCIL OF STATE GOVERNMENTS, U.S. CONFERENCE OF MAYORS, NATIONAL LEAGUE OF CITIES, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL GOVERNORS' ASSOCIATION, AND INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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Pursuant to Rule 37.4 of the Rules of this Court, *amici* respectfully move this Court for leave to file the attached brief *amici curiae* in support of respondent. Respondent has consented to the filing of this brief. This motion is made necessary by the failure of petitioner to consent to the filing.

The *amici* are organizations whose members include State, county, and municipal governments and officials throughout the United States. *Amici* have a compelling and continuing interest in the issue presented in this case:

when does an Act of Congress diminish the boundaries of an Indian reservation?

Determining the precise boundaries of Indian reservations situated within the States of *amici*'s members is a matter of considerable importance. Land within the boundaries of an Indian reservation is "Indian country" as defined in 18 U.S.C. § 1151. Crimes committed by Indians in "Indian country" are in most cases not within the jurisdiction of State courts, but rather are subject to federal and tribal jurisdiction. See 18 U.S.C. §§ 1152, 1153, 1162. In addition, the civil jurisdiction and regulatory powers of the States hinge in part on the reservation status of lands. See generally *Oklahoma Tax Comm'n v. Sac and Fox Nation,* 113 S. Ct. 1985 (1993). Ambiguity in reservation boundaries thus creates jurisdictional uncertainty and gives rise to disputes between state, tribal, and federal authorities. Moreover, where, as here, "an area is predominantly populated by non-Indians, finding that the land remains Indian country seriously burdens the administration of state and local governments." *Solem v. Bartlett,* 465 U.S. 463, 471 n.12 (1984).

Because *amici* have a compelling interest in the rules governing their territorial jurisdiction, they seek leave to file this brief to assist the Court in the resolution of this case.

Respectfully submitted,

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QUESTION PRESENTED

Whether the Act of May 27, 1902, ch. 888, 32 Stat. 245, as amended, which directed that certain unallotted lands in the Uintah Indian Reservation in Utah "shall be restored to the public domain," diminished the size of that reservation.

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INTEREST OF THE *AMICI CURIAE*

The interest of the *amici* is set forth in the motion accompanying this brief.

STATEMENT

This case arises out of petitioner Robert Hagen's felony conviction, on a plea of guilty in Utah court, for distributing illegal drugs in Myton, Utah. Petitioner contends that Myton is located within the boundaries of an Indian reservation, that the Utah courts therefore lacked

jurisdiction over him, and that his conviction accordingly is invalid. The Utah Supreme Court rejected petitioner's argument and upheld his conviction, reasoning that Myton, which is situated in an area that Congress ordered "restored to the public domain" (Act of May 27, 1902, ch. 888, 32 Stat. 245), is no longer a part of the present-day Uintah and Ouray Indian Reservation ("Uintah Reservation").

A. History of the Uintah Reservation.

The Uintah Reservation is located in northeastern Utah and inhabited by the Ute Indians, a federally recognized tribe consisting of the White River, Uintah and Uncompahgre Bands. On October 3, 1861, President Lincoln signed an executive order creating the original Uintah Valley Indian Reservation. Executive Order 38-1, *reprinted in* 1 Charles J. Kappler, *Indian Affairs: Laws and Treaties* 900 (1904). President Lincoln's order set aside approximately two million acres, mostly within what is now Duchesne County.[1] In 1864, Congress confirmed the establishment of the reservation. Act of May 5, 1864, ch. 77, 13 Stat. 63.

Beginning in 1887, and continuing until 1934 when the policy was abandoned, Congress sought to encourage the "eventual assimilation of the Indian population" and "the general extinction of Indian reservations and Indian titles" (*Montana v. United States,* 450 U.S. 544, 559 n.9 (1981) (internal quotations omitted)), in a "comprehensive attempt to create a new role for the Indian in American Society." Felix S. Cohen, *Handbook of Federal Indian Law* 130 (1982). To carry out this policy, Congress passed a series of "surplus land" or "allotment" Acts, which allotted to individual tribal members Indian reservation lands previously owned in common by tribes. The remaining, unallotted reservation lands were made available for purchase and settlement by non-Indians.

[1] Today roughly 1.1 million acres of the original reservation are tribally owned "trust lands," on which nearly all of the approximately 3000 enrolled members of the Ute tribe reside. J.A. 28-29 & n.10; Br. Resp. 10 n.9. It is agreed by the parties that these lands remain part of the Uintah Reservation. Accordingly, this case concerns diminishment—rather than disestablishment—of an Indian reservation. On the significance of the distinction, see *Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584, 598 n.20 (1977).

A major aim of Congress's allotment policy was to encourage individual Indians to become yeoman farmers and thereby to integrate them into the economy of the time. See *Solem v. Bartlett,* 465 U.S. 463, 466 (1984); *Ute Indian Tribe v. Utah,* 521 F. Supp. 1072, 1086 n.38 (D. Utah 1981); J.A. 29-30. The Uintah Valley Reservation was not excepted from this national policy of encouraging assimilation through allotment; Congress passed a series of Acts allotting or proposing to allot lands within the boundaries of the original reservation.

The first such Act relating to the Uintah Reservation was passed in 1888. This statute, whose stated purpose was "to restore to the public domain a part of the Uintah Valley Indian Reservation," opened a small area of the reservation to mining claims. Act of May 24, 1888, ch. 310, 25 Stat. 157. The opened area, known as the "Gilsonite Strip" after a mineral found there, was "declared to be public lands of the United States and restored to the public domain." *Ibid.* The Act required three-fourths of the adult male Indians on the reservation to consent before the "restoration shall take effect," which they did, and further provided that the proceeds of the sale of the land were to be deposited in the United States Treasury and credited to the Utes. *Ibid.* The parties to this case do not dispute that the 1888 Act altered the reservation boundaries by removing the Gilsonite Strip. See J.A. 43; *Ute Indian Tribe,* 521 F. Supp. at 1099.

In 1894 and again in 1898 Congress attempted to allot agricultural lands on the Uintah Reservation to members

of the Ute Tribe. The Act of Aug. 15, 1894, ch. 290, 28 Stat. 286, directed the President to appoint a three-person commission to negotiate the Indians' acceptance of the proposed allotments. The statute instructed the commissioners to obtain "the relinquishment to the United States of the interest of said Indians in all lands within said reservation not needed for allotment in severalty to said Indians * * *." *Ibid.* Because of delays occasioned by the 1894 commission's negotiations with the nearby Uncompahgre Band (see S. Doc. No. 32, 55th Cong., 1st Sess. 2-3 (1897)), Congress authorized the creation of a new commission in 1898. Act of June 4, 1898, ch. 376, 30 Stat. 429. A stated purpose of the 1898 Act was "to obtain the cession to the United States of all lands within [the Uintah Indian Reservation] not * * * allotted." *Ibid.* Similarly, the new commission was explicitly directed to seek the Utes' agreement to "the cession to the United States" of all unallotted lands within the reservation. *Ibid.* Although the 1898 Act called for the consent of only a majority of the adult male Utes, rather than the three-quarters required under the 1894 Act, the commission was unable to gain the Indians' approval.

On May 27, 1902, Congress enacted the legislation that is principally at issue in this case. Act of May 27, 1902, ch. 888, 32 Stat. 245. The 1902 Act again provided for the allotment of Uintah Reservation lands with the consent of a majority of adult male Utes. The Act required that allotments be made by October 1, 1903. And, in words virtually identical to those of the 1888 Act diminishing the reservation by removing the Gilsonite Strip, the Act mandated that after October 1, 1903, all unallotted lands "shall be restored to the public domain." *Ibid.* Unallotted lands "so restored to the public domain" were then to be sold for a fixed sum of $1.25 per acre, with the proceeds used first to reimburse the United States for monies advanced to the Indians and second "for the benefit of [the] Indians," as directed by the Secretary of the Interior. *Ibid.* Among other things, the Act also appropriated $70,064.48 "to be paid to the Uintah and the White River tribes of Ute Indians" when a majority of the adult males consented to both "the allotment of lands and the restoration of the unallotted lands within said reservation as herein provided." *Ibid.*[2]

Congress did not fund the surveying needed to implement the 1902 Act until March 1903. Indian Appropriations Act of Mar. 3, 1903, ch. 994, 32 Stat. 982, 997-998. See *Ute Indian Tribe*, 521 F. Supp. at 1116. Because of this delay, the 1903 Act pushed back by a full year the 1902 Act's deadline, to October 1, 1904.

Congress passed the 1903 Act only two months after this Court's landmark ruling in *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903). *Lone Wolf* held that Congress possesses plenary power over reservation lands, and thus may unilaterally alter reservation boundaries without tribal consent. In the 1903 Act, Congress accordingly for the first time did not require that the Utes assent to the allotment of reservation lands. Indeed, the 1903 Act specifically instructed the Department of the Interior to

> send an inspector to obtain the consent of the Uintah and White River Ute Indians to an allotment of their lands as directed by the act of May twenty-seventh, nineteen hundred and two, and if their consent, as therein provided, can not be obtained by June first, nineteen hundred and three, *then the Secretary of the Interior shall cause to be allotted* to each of said Uintah and White River Ute Indians the quantity and character of land named and described in said act * * *.

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[2] One month after passing the 1902 Act, Congress amended it by Joint Resolution. J. Res. 31, 57th Cong., 1st Sess., 32 Stat. 744 (1902). The Joint Resolution directed that the $70,064.48 appropriated for payment to the Utes be paid out "without awaiting their action upon the proposed allotment * * * and the restoration of the surplus lands to the public domain." *Ibid.*

32 Stat. 982, 997 (emphasis added). In 1904, responding to further delays in surveying and other administrative tasks necessary for allotment of the Uintah Reservation, Congress again extended the deadline for implementation of the 1902 Act, this time to March 10, 1905. Act of Apr. 21, 1904, ch. 1402, 33 Stat. 189, 207-08.

Additional delays required one more extension of the 1902 Act's deadline. In 1905, Congress set a deadline of September 1, 1905, but granted the President authority to set an earlier date if he deemed the allotment work complete before then. Act of Mar. 3, 1905, ch. 1479, 33 Stat. 1048, 1069-70. In response to concerns that speculators would buy up the unallotted lands, the 1905 Act also provided that, for the first five years after the lands were restored to the public domain, settlement would be permitted only under the terms of the homestead and town-site laws:

> [T]he said unallotted lands, excepting such tracts as may have been set aside as national forest reserve, and such mineral lands as were disposed of by the [1902 Act], shall be disposed of under the general provisions of the homestead and town-site laws of the United States, and shall be opened to settlement and entry by proclamation of the President, which proclamation shall prescribe the manner in which these lands may be settled upon, occupied, and entered by persons entitled to make entry thereof * * *.

Ibid. After five years, these restrictions on the "manner" of settlement would lapse and all unallotted lands that had not been disposed of would "be sold and disposed of for cash," with "[t]he proceeds" to be "applied as provided" in the 1902 Act. *Ibid.*

On July 14, 1905, President Roosevelt issued a proclamation opening the unallotted lands to settlement as of August 28, 1905:

> Whereas it was provided by the Act of Congress, approved May 27, A.D., 1902 (32 Stat., 263),

> among other things, that on October first, 1903, the unallotted lands in the Uintah Indian Reservation, in the State of Utah, 'shall be restored to the public domain * * *.'
>
> And, whereas, the time for the opening of said unallotted lands was extended * * * by the Act of Congress approved Mar. 3, 1903 * * * and * * * by the Act of Congress approved Apr. 21, 1904 * * * and * * * by the Act of Congress, approved Mar. 3, 1905 * * *.
>
> Now therefore I, Theodore Roosevelt, * * * hereby declare and make known that all unallotted lands in said reservation [with certain exceptions] * * * will on and after the 28th day of Aug., 1905, in the manner hereinafter prescribed * * * be opened to entry, settlement and disposition under the general provisions of the homestead and townsite laws of the United States * * *.

Presidential Proclamation of July 14, 1905, 34 Stat. 3119.

B. Proceedings Below.

On August 28, 1989, petitioner pleaded guilty in the Eighth District Court of Duchesne County, Utah, to distribution of marijuana. J.A. 2, 15. Before sentencing, petitioner sought to withdraw his guilty plea, arguing that the state court lacked jurisdiction because he is a member of the Little Shell Band of Chippewa Indians of Montana and because the Town of Myton, where he committed the offense, lies within the boundaries of the Uintah Reservation. J.A. 15; Pet. App. I, at 2.[3] The trial court denied the motion, finding that petitioner is not an Indian. Pet. App. I, at 4-5. The Utah Court of Appeals reversed,

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[3] Under 18 U.S.C. § 1151(a) "Indian country" includes "all land within the limits of any Indian reservation under the jurisdiction of the United States Government * * *." State jurisdiction in Indian country is generally limited to crimes by non-Indians against non-Indians, and victimless crimes by non-Indians. See *Solem v. Bartlett*, 465 U.S. 463, 465 n.2 (1984).

holding that (1) the State had failed to carry its burden of showing that petitioner is not an Indian, and (2) Myton is situated within the Uintah Reservation as its boundaries were defined by the Tenth Circuit in *Ute Indian Tribe v. Utah*, 773 F.2d 1087 (10th Cir. 1985) (en banc), cert. denied, 479 U.S. 994 (1986). *State v. Hagen*, 802 P.2d 745 (Utah Ct. App. 1990).

The Utah Supreme Court reversed in turn and reinstated petitioner's conviction. J.A. 15-16. Explaining that Myton is not located on the Uintah Reservation because the "1902 and 1905 congressional acts diminished the original * * * Reservation boundaries," the Utah Supreme Court referred to and adopted as the basis for its decision the reasoning set forth in a companion case decided the same day, *State v. Perank*, 191 Utah Adv. Rep. 5 (Utah July 17, 1992). J.A. 16.

In *Perank*, the Utah Supreme Court offered a detailed analysis of congressional and presidential actions affecting the Uintah Reservation. See J.A. 18-87. Canvassing the pertinent case law, the Court explained, first, that the operative language of the 1902 Act, which directed that unallotted lands were to be "restored to the public domain," clearly effected a diminishment of the Uintah Reservation. J.A. 29-41. In so holding, the Utah Supreme Court declined to follow the Tenth Circuit's contrary decision in *Ute Indian Tribe*. J.A. 37; see also J.A. 34-41. Second, the Court explained that the 1902 Act's operative language remained in effect in 1905, when the unallotted lands were opened pursuant to President Roosevelt's Executive Order, because "the 1905 Act was merely amendatory and supplementary to the 1902 Act" and therefore "did not repeal the 1902 Act's restoration language." J.A. 42. In reaching that conclusion, the Utah Supreme Court relied on an extensive review of "the pertinent statutes, legislative history, and contemporaneous and subsequent congressional, executive, and judicial constructions of the 1902 and 1905 Acts," all of which showed, the Court concluded, "that the 1902 Act

was considered the basic statute dealing with the opening of the Reservation." J.A. 42. See also J.A. 44-73.

SUMMARY OF ARGUMENT

Land set aside by Congress for an Indian reservation retains its reservation status until Congress evinces a clear intent to change the reservation boundaries. That principle does not, however, dictate use of any particular test in determining congressional intent; to the contrary, the Court has expressly eschewed use of a rigid or mechanical approach in determining Congress's purpose in this setting. Congress may, of course, diminish a reservation by using express statutory language to that effect. And when the statutory language is ambiguous, the Court will consider all of the usual indicia of legislative intent—and some that are most unusual, such as post-enactment demographic changes on the land in question.

In this case, the plain language of the 1902 Act diminished the Uintah Reservation. The Act provides that unallotted lands "shall be restored to the public domain." In every one of this Court's decisions concerning diminishment of Indian reservations, that phrase has been understood to deprive the land in question of reservation status. The 1903, 1904, and 1905 Appropriations Acts concerning the Uintah Reservation did not reflect a change in Congress's baseline purpose. The later statutes were not independent of the 1902 Act; to the contrary, they extended the initial Act's deadline and were expressly intended to carry out its purposes. None of them displaced the operative language of the 1902 Act, which restored the unallotted portion of the Uintah Reservation to the public domain and thus removed it from the reservation.

ARGUMENT

I. IN ASSESSING CONGRESS'S INTENT BEHIND A PARTICULAR SURPLUS LAND ACT, THIS COURT CONSISTENTLY HAS EXAMINED ALL RELEVANT FACTORS BEARING ON THAT ISSUE.

It is common ground between the parties and the United States that Congress possesses "plenary authority to legislate for the Indian tribes in all matters, including their form of government." *United States v. Wheeler,* 435 U.S. 313, 319 (1978). It is thus clear, as this Court held in *Lone Wolf v. Hitchcock,* 187 U.S. 553 (1903), that Congress may "diminish reservations unilaterally." *Solem v. Bartlett,* 465 U.S. 463, 470 n.11 (1984). The parties and the United States also agree that whether Congress has diminished a reservation is a question of congressional intent. See *Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584, 586, 588 n.4 (1977).

Over the past thirty years, this Court has considered that intent in the context of surplus land Acts on five occasions. *Solem*; *Rosebud*; *DeCoteau v. District County Court,* 420 U.S. 425 (1975); *Mattz v. Arnett,* 412 U.S. 481 (1973); *Seymour v. Superintendent,* 368 U.S. 351 (1962). As the Court explained most recently in *Solem,* these cases have established "a fairly clean analytical structure" for determining whether a particular surplus land Act altered a reservation's boundaries or instead merely granted non-Indians the right to purchase lands within the reservation. 465 U.S. at 470. Under this Court's well-established approach, land set aside by Congress for an Indian reservation "retains its reservation status" until Congress "clearly evince[s] an 'intent . . . to change . . . boundaries.'" *Solem,* 465 U.S. at 470 (quoting *Rosebud,* 430 U.S. at 615).

In deciding whether there is clear evidence that Congress intended to diminish reservation boundaries, this

Court examines several factors. Not surprisingly, the first factor is the language and structure of the Act itself. "The *most* probative evidence of congressional intent," of course, "is the statutory language *used to open* the Indian lands." *Solem,* 465 U.S. at 470 (emphasis added). If the operative language of the statute contains either an "[e]xplicit reference to cession," or "other language evidencing the present and total surrender of all tribal interests," then this "strongly suggests that Congress meant to divest from the reservation all unallotted opened lands." *Ibid.* Such express operative language, however, is not required for diminishment. *Id.* at 471. See also *Rosebud,* 430 U.S. at 588 n.4 (rejecting "notion that * * * express language in an Act is the *only* method by which congressional action may result in disestablishment") (emphasis in original). In addition to the statute's operative language, other language in the Act, as well as the Act's structure, may provide evidence of congressional intent. See *Solem,* 465 U.S. at 472-73.

A second factor examined by this Court involves the "events surrounding the passage of [the] surplus land Act." *Solem,* 465 U.S. at 471. These include not only the historical events leading up to passage, but also the genesis of the legislation as well as all of the usual legislative materials. *Id.* at 471, 476-78. A third factor, relied on by this Court to a "lesser extent," consists of the "events that occurred after * * * passage," including the "subsequent treatment" of the area in question "by Congress, courts, and the Executive." *Id.* at 471, 478. Finally, this Court has looked to subsequent demographic changes on the land in question, out of a pragmatic recognition "that who actually moved onto opened reservation lands is also relevant to deciding whether a surplus land Act diminished a reservation." *Id.* at 471, 479-80.

In assessing Congress's intent behind a particular surplus land Act, this Court has eschewed a mechanistic approach to these factors. In *Rosebud,* for example, the Court declined to "seize[] upon" particular factors as

"absolutes," opting instead for a more flexible inquiry in which all relevant evidence of intent is examined and given its due weight. See 430 U.S. at 588 n.4. Nevertheless, the Solicitor General, and to a lesser extent petitioner, now urge the Court to adopt a rigid formula for deciding reservation diminishment cases. See U.S. Br. 7-9; Pet. Br. 30-31 (setting forth "two alternative tests" for determining whether Congress intended to diminish). Thus, while acknowledging limited exceptions to its proposed rule, the United States appears to argue that an Act of Congress may be found to diminish a reservation only when it employs "unambiguous language of cession" *and* either grants "unconditional compensation to the Indians" or is accompanied by "an unequivocal and widely held contemporaneous understanding that the reservation is diminished." U.S. Br. 9, 23; accord Pet. Br. 30-31.

Apart from its inconsistency with this Court's decisions, there are several difficulties with the Solicitor General's proposed test.[4] *First*, to the extent that it requires "unambiguous language of cession," the United States' approach ignores obvious differences in how the various surplus land Acts originated. As this Court has repeatedly

[4] The United States is simply wrong in suggesting that the "bright-line rule" it advances was "articulated in *Solem*." U.S. Br. 24 n.32; see also *id.* at 7 (stating that *Solem* "establishes a clear-statement rule"). The Court indicated in *Solem* that "[w]hen [unambiguous] language of cession is buttressed by an unconditional commitment from Congress to compensate the Indian tribe for its opened land, there is an *almost insurmountable presumption* that Congress meant for the tribe's reservation to be diminished." 465 U.S. at 470-71 (emphasis added). The Solicitor General would turn that observation on its head: while the two factors identified by the *Solem* Court in combination *compel* a finding of diminishment, the Court nowhere suggested that both (or, for that matter, either one) are *necessary* for a finding of diminishment. To the contrary, *Solem* itself restated the variety of considerations previously regarded as pertinent in ascertaining congressional intent, and proceeded to examine those factors as they related to the 1908 Cheyenne River Act. *Id.* at 470-80.

recognized, some of those Acts had their genesis in agreements with the affected Indians, which Congress merely ratified, whereas others represented "unilateral action by Congress." *DeCoteau*, 420 U.S. at 448. See also *Rosebud*, 430 U.S. at 587, 597-99 & n.20, 608-09. One would expect language regarding "cession" to appear only in Acts that originated as agreements because " 'cession' refers to a voluntary surrender of territory or jurisdiction, rather than a withdrawal of such jurisdiction by the authority of a superior sovereign." *Id.* at 597. And as a consequence of this Court's holding in *Lone Wolf* that Congress need not reach an agreement with tribes in order to diminish reservations,[5] express language of cession was much less common after 1903 than it was before. See National Indian Law Library, Allotment/Cession Statutes, Doc. No. 002279, table B (1973) (listing 25 Acts employing language of outright cession, 23 of which were passed prior to *Lone Wolf*).[6]

Second, in placing great emphasis on the existence of "an unconditional commitment from Congress to compensate the Indian tribe" (U.S. Br. 8, 12-14), the Solicitor General's test ignores not only this Court's decisions but also the history of Congress's allotment policy. To begin

[5] See *Solem*, 465 U.S. at 470 n.11; *Rosebud*, 430 U.S. at 587-88, 593-95 & nn.13, 17, 597-98 & nn.19-20, 608-09.

[6] We note, moreover, that the typical operative language found in the pre-1903 agreements—a series of overlapping synonyms for "relinquish"—is precisely what one would expect to find in a contract that is both aimed at securing the relinquishment of rights and drafted by the beneficiary of such relinquishment. See, *e.g.*, *DeCoteau*, 420 U.S. at 445 (ratified agreement provided that Indians would "cede, sell, relinquish, and convey * * * all of their claim, right, title, and interest"); *id.* at 439 & n.21 (setting forth the operative language from numerous 1891 agreements ratified by Congress). The overwhelming clarity of the operative language of these agreements reflects, in our view, the nature of the instrument rather than the strength of Congress's intent.

with, the absence of a "sum certain" payment was expressly found consistent with diminishment in *Rosebud*. See 430 U.S. at 598 n.20. Nothing in *Solem* altered that holding.[7] Moreover, because after 1903 Congress, under the authority of *Lone Wolf*, no longer needed to obtain tribal consent to a change in reservation boundaries, it had less need to make an unconditional commitment concerning payment to induce the Indians to agree to diminishment.

Third, in permitting an exception to its "clear-statement" rule only where there was a widely held contemporaneous understanding that the reservation was diminished (see U.S. Br. 8-9, 11, 22-23)—and in requiring that the understanding *be shared by the Indians* and manifested by "an agreement of cession" (*id.* at 23)—the Solicitor General's test wholly ignores the import of *Lone Wolf*. That decision held that Congress has the power unilaterally to diminish reservations *without* tribal consent, even in derogation of treaty rights. Again and again, this Court has recognized the importance of *Lone Wolf* in understanding Congress's intent. See *Solem*, 465 U.S. at 470 n.11; *Rosebud*, 430 U.S. at 587-88, 593-95 & nn.13, 17, 597-98 & nn.19-20, 608-09. In discerning that intent, the views of the affected Indians are no more relevant than those of the Executive or other parties with an interest in the legislative process. Perhaps more fundamentally, the Solicitor General's suggestion that the understanding of the Indians regarding the effect of an Act of Congress must be expressed through a vote for cession would, as a practical matter, substantially undercut the holding of *Lone Wolf*.

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[7] In addition, the United States' position overlooks "the belief shared by Congress and the Executive that the Indians were not entitled to compensation upon the abolition of an *executive order reservation*," *Sioux Tribe v. United States*, 316 U.S. 317, 330 (1942) (emphasis added); Congress's failure to offer the Indians a sum certain accordingly says little about congressional intent when such a reservation is involved.

In sum, this Court should reject petitioner's and the United States' invitation to abandon its traditional approach to discerning Congress's intent in cases involving diminishment of reservations. In this case, as in previous cases, the Court should examine all of the relevant factors bearing on congressional purpose. We submit that all of these considerations compel the conclusion that the allotment Acts affecting the Uintah Reservation resulted in a diminishment of reservation boundaries. Respondent and its other *amici* address the legislative history and other circumstances surrounding enactment of the Acts. We therefore devote the remainder of our argument to an examination of the single most important factor: the plain language of the statutes.

II. THE 1902 ACT, AS AMENDED, UNEQUIVOCALLY DIMINISHED THE UINTAH RESERVATION.

A. Congress Chose Operative Language Precisely Suited To Diminishment By Directing That All Unallotted Lands "Shall Be Restored To The Public Domain."

The 1902 Act allotting the Uintah Indian Reservation contained the operative language by which Congress, after several delays to resolve administrative matters, opened the reservation to non-Indian settlers in 1905. In the 1902 Act, Congress directed that all lands remaining after allotment *"shall be restored to the public domain."* Act of May 27, 1902, ch. 888, 32 Stat. 245 (emphasis added). In every one of this Court's decisions concerning diminishment of an Indian reservation, the phrase "restored to the public domain" has been viewed as depriving the land in question of its reservation status. Indeed, this Court itself has repeatedly employed the phrase as a *synonym* for loss of such status.

This is only logical. When the federal government reserves a tract for any purpose (for example, when it creates an Indian reservation), the tract is severed from

the public domain. Land is *removed* from the the public domain in order to create Indian reservations; *restoring* that same land to the public domain logically terminates its reserved status. See *Seymour,* 368 U.S. at 354 (quoting statute which "restored to the public domain" certain lands while stating that other lands were "still reserved").

Thus in *Seymour* a unanimous Court explained that an 1892 Act providing that the North Half of the Colville Reservation be "vacated and restored to the public domain" diminished that reservation. 368 U.S. at 354.[8] Moreover, in *Seymour* the Court itself twice employed the phrase "restored to the public domain" as a rough synonym for diminishment. In disagreeing with the Washington courts' conclusion that a 1906 Act had disestablished the South Half of the Colville Reservation, this Court criticized the lower courts for "ignor[ing] important differences" between the 1906 Act "and the provisions of the 1892 Act restoring the North Half of the reservation to the public domain." 368 U.S. at 355. See also *id.* at 353 (trial court's finding of disestablishment described as a conclusion, among other things, that "the land in question [had been] restored to the public domain").[9]

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[8] In an effort to distinguish *Seymour,* both petitioner and the United States seize on the word "vacates" in the 1892 Act, suggesting that this single word "expresses a concept of extinguishment completely absent from the language at issue here." U.S. Br. 17 n.23; Pet. Br. 38-39. This argument, however, ignores the fact that elsewhere in the 1892 Act the phrase "restored to the public domain" is used without the word "vacate." See Act of July 1, 1892, ch. 140, § 8, 27 Stat. 63.

[9] Contrary to the Solicitor General's suggestion (see U.S. Br. 17 n.23), this Court's discussion of the 1892 Act in *Seymour* cannot be brushed aside as an "implicit[] assum[ption]" or as remarks made "in passing." Rather, the *Seymour* Court's threshold determination that "the size of [the Colville Reservation] was diminished" by Congress's 1892 Act formed the basis for its analysis, by way of comparison, of the 1906 Act. See 368 U.S. at 354.

In *Mattz v. Arnett,* 412 U.S. 481 (1973), the Court held that another Act passed by Congress in 1892 did not disestablish the Klamath River Reservation in California. Noting that Congress "was fully aware" of how to bring about diminishment, and that the statute under review was passed "just two weeks after the 1892 Act" involved in *Seymour,* the Court cited the latter as an example of Congress using "clear language of express termination when that result is desired." *Id.* at 504 n.22.

This consistent usage was carried forward in *DeCoteau v. District County Court,* 420 U.S. 425 (1975), where even the Court's phrasing of the question presented reflected the notion that land restored "to the public domain" was no longer part of a reservation. See *id.* at 426 ("These two cases * * * raise the single question whether the Lake Traverse Indian Reservation * * * was terminated and *returned to the public domain,* by the Act of Mar. 3, 1891 * * *.") (emphasis added). What is more, this Court quoted similar terminology employed by the court below and by sponsors of the legislation. *Id.* at 430 (" 'became part of the public domain' ") (quoting decision below, 211 N.W.2d 843, 845), 441 (" 'surrender of a large portion of their reservation to the public domain' ") (quoting remarks of Sen. Dawes, 22 Cong. Rec. 3789 (1891)). Finally, in pointing out the similarity between the operative language of express cession in the Indian agreement under review and language in other agreements ratified in the same statute, the Court stated: "That the lands ceded in the other agreements were *returned to the public domain, stripped of reservation status,* can hardly be questioned * * *. The sponsors of the legislation stated repeatedly that the ratified agreements would *return* the ceded lands *to the 'public domain.'* " *Id.* at 446 (emphasis added). This is clear evidence of the Court's conviction that restoration of reservation lands "to the public domain" would necessarily "strip[]" those lands "of reservation status."

Similarly, in *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977), all Members of this Court agreed that an 1889 Act which ordered a portion of the Great Sioux Reservation "restored to the public domain" altered reservation boundaries. *Id.* at 589 & n.5 (indicating that this language effected a "termination of Reservation status"); *id.* at 618 (Marshall, J., joined by Brennan and Stewart, JJ., dissenting) (citing the 1889 Act as "yet another example" of Congress's use of "clear language of express termination").[10] In *Rosebud*, the Court also reaffirmed what it had said in *Mattz* concerning the 1892 Act that "vacated and restored to the public domain" the North Half of the Colville Reservation, noting once again that this language clearly indicated an intent to alter reservation boundaries. *Id.* at 588 n.4; *id.* at 618 (Marshall, J., joined by Brennan and Stewart, JJ., dissenting). See also *Sioux Tribe v. United States*, 316 U.S.

[10] The United States suggests that in *Rosebud* this Court merely "accepted the parties' understanding" concerning the effect of the 1889 Act. U.S. Br. 17 n.23. That reading of *Rosebud*, however, finds no support in the majority opinion and is plainly inconsistent with Justice Marshall's dissent. The Solicitor General also notes that three-fourths of the Sioux agreed to the 1889 Act's termination, whereas Indian consent was not obtained in this case. But putting aside the fact that the 1889 Act was passed well before this Court's decision in *Lone Wolf*, at a time when such consent was required (unlike the 1902-05 statutes involved in this case, which straddled *Lone Wolf*), this argument lacks support in the *Rosebud* opinions. Justice Marshall made no mention of consent, pointing only to the language of the 1889 Act (430 U.S. at 618); the majority focused on the restoration language and mentioned consent only in passing in a footnote (*id.* at 587 & n.2). Petitioner's suggestion (Br. 48) that something more is needed to effect diminishment besides language restoring land to the public domain—a broader variant of his claim concerning the presence of the word "vacate" in the 1892 Act in *Seymour* (see note 8, *supra*)—is of course inconsistent with *Rosebud*, where the statute described by this Court as effecting a "termination of Reservation status" (430 U.S. at 589 n.5) merely ordered reservation lands "restored to the public domain."

317 (1942) (repeatedly employing phrase "restore to the public domain" as synonym for diminishment).

Finally, in *Solem*, the Court considered a statute whose operative language simply authorized the Secretary of the Interior to "sell and dispose" of reservation lands. 465 U.S. at 472. "The balance of the Cheyenne River Act" included a provision governing timber rights—located in the very last line of the statute, some three pages of small print after the operative language just cited—which provided that "Indians residing upon their allotments" in certain townships "shall have the right to use timber in said townships, * * * for domestic purposes only as long as the lands remain *part of the public domain.*" Act of May 29, 1908, ch. 218, 35 Stat. 460, 464 (emphasis added). Even this oblique and "isolated" reference to land situated in the "public domain," the Court stated, "[u]ndisputedly * * * support[s] petitioners' view that the Cheyenne River Act diminished the reservation." *Solem*, 465 U.S. at 475. Nevertheless, the Court concluded that the two phrases invoked by the petitioners in *Solem* (the reference to "public domain" and another provision allowing for allotments within "the reservation thus diminished") could not, "when balanced against the * * * Act's limited goal[s]" as expressed in its operative language, "carry the burden of establishing an *express* congressional purpose to diminish." *Ibid.* (emphasis added). In a footnote, the Court added, somewhat tentatively, that there was "considerable doubt as to what Congress meant in using these phrases" because the unallotted lands to which the timber provision referred "*could* be conceived of as being in the 'public domain' inasmuch as they were available for settlement." *Id.* at 475 n.17 (emphasis added).

Contrary to the assertions of petitioner and the United States (Pet. Br. 46-47; U.S. Br. 16-18), *Solem* did not deviate from this Court's consistent understanding of the meaning of statutory language ordering the return or restoration of reservation lands to the public domain.

The reference to the public domain in the statute at issue in *Solem* was not the operative language of the statute; it was not the language chosen by Congress to open up reservation lands. Instead, the operative "sell and dispose" language of the Act considered in *Solem* was identical to that held not to diminish a reservation in *Seymour*. Even so, the Court found the mere mention of "public domain" to be evidence of diminishment,[11] although the Court understandably refused to rely on an "isolated" phrase providing for timber cutting on part of the reservation to establish the requisite clear congressional intent to diminish a large section of the reserved land.

Not surprisingly, a long line of lower court opinions in surplus land Act cases have followed this Court's lead in concluding that language ordering the return or restoration of land to the public domain has the effect of diminishing a reservation.[12] Indeed, in *State v. Perank*, the com-

[11] It should be noted that, even had it not been isolated from the operative portion of the statute, the reference to the "public domain" in the Act before the Court in *Solem* would have been less probative of diminishment than the 1902 statute at issue here: there was no mention in the *Solem* statute of "return" or "restoration" of reservation lands. Compare U.S. Br. 16-17 (incorrectly stating that this Court in *Solem* "considered the effect of a statute referring to a restoration of reservation lands to the public domain"). The words "restoration" or "return" obviously suggest the reversion of lands to a status predating (and legally inconsistent with) reservation status.

[12] See, *e.g.*, *Russ v. Wilkins*, 624 F.2d 914, 915, 924 (9th Cir. 1980), cert. denied, 451 U.S. 908 (1981); *United States v. Southern Pac. Transp. Co.*, 543 F.2d 676, 696 (9th Cir. 1976); *United States ex rel. Feather v. Erickson*, 489 F.2d 99, 100 (8th Cir. 1973), rev'd on other grounds sub nom. *DeCoteau v. District County Court*, 420 U.S. 425 (1975); *United States ex rel. Condon v. Erickson*, 478 F.2d 684, 687-88 (8th Cir. 1973); *Beardslee v. United States*, 387 F.2d 280, 285 (8th Cir. 1967) (Blackmun, J.); *DeMarrias v. South Dakota*, 319 F.2d 845, 846 (9th Cir. 1963). See also *Lower Brule Sioux Tribe v. South Dakota*, 711 F.2d 809, 817 n.8 (8th Cir. 1983), cert. denied, 464 U.S. 1042 (1984); *United States ex rel. Cook v.*

panion case to the decision below, the Utah Supreme Court noted that it was able to locate only one decision holding that such language does not disestablish the affected portion of a reservation. J.A. 37.[13]

In sum, under this Court's and the lower courts' consistent understanding, where the operative language of a surplus land Act is a directive to restore or return reservation lands "to the public domain," Congress has chosen language that is " 'precisely suited' to disestablishment." *Rosebud*, 430 U.S. at 597 (quoting *DeCoteau*, 420 U.S. at 445). Such an unequivocal expression of intent to alter reservation boundaries should be accorded all the more weight, moreover, because at the time the surplus land statutes were enacted, Congress had every reason *not* to specify such an effect on boundaries.[14] To hold

Parkinson, 525 F.2d 120, 124 (8th Cir. 1975), cert. denied, 430 U.S. 982 (1977); *Putnam v. United States*, 248 F.2d 292, 295 (8th Cir. 1957). See generally J.A. 40-41.

[13] The one opinion so holding—and the only such case cited by petitioner or his supporting *amici*—is *Ute Indian Tribe v. Utah*, 773 F.2d 1087, 1092 (10th Cir. 1985) (en banc), cert. denied, 479 U.S. 994 (1986), which also considered the statutes at issue in this case. *Ute Indian Tribe*'s conclusion, which related to the Uncompahgre rather than the Uintah Valley Reservation, has been roundly criticized by a subsequent panel of the Tenth Circuit as "unexamined and unsupported." *Pittsburg & Midway Coal Mining Co. v. Yazzie*, 909 F.2d 1387, 1400 (10th Cir.), cert. denied, 498 U.S. 1012 (1990). Further, the district court in *Ute Indian Tribe* found it "abundantly clear" that Congress diminished the Uintah Reservation in 1888 when it ordered the Gilsonite Strip "restored to the public domain," a conclusion the parties did not dispute on appeal. See 521 F. Supp. at 1099; page 3, *supra*. A majority of the judges who heard the *en banc* appeal agreed that the Gilsonite Strip Act was an example of statutory language explicitly diminishing the Uintah Reservation. 773 F.2d at 1098 (Seymour, J., joined by Holloway, C.J., McKay and Logan, JJ., concurring); *id.* at 1108 (Seth, J., joined by Barrett, J., dissenting).

[14] At the time that the surplus land Acts at issue here were enacted, "Indian lands were judicially defined to include only those lands in which the Indians *held some form of property interest*: trust lands, individual allotments, and, to a more limited

otherwise would be contrary to settled law and would throw into doubt the heretofore settled legal status of many tracts of lands across the country that Congress has "restored to the public domain."

B. The 1903, 1904, And 1905 Appropriations Acts Did Not Supplant The 1902 Act Nor Did They Reflect A Change In Congress's "Baseline Purpose" To Diminish The Uintah Reservation.

Given the history of congressional enactments affecting the lands at issue in this case, the 1905 Act "cannot, and should not, be read as if it were the first time Congress had addressed itself to the diminution of" the Uintah Reservation. *Rosebud,* 430 U.S. at 592; see also *id.* at 606 n.30. Not only the 1902 Act, but also the Acts of 1894 and 1898, and even the 1888 cession of the Gilsonite Strip, indicate that Congress fully intended to change the reservation's boundaries. Congress's "unmistakable baseline purpose of disestablishment" (*Rosebud,*

degree, opened lands that had not been claimed by non-Indians." *Solem,* 465 U.S. at 468 (emphasis added). *See also Bates v. Clark,* 95 U.S. 204, 208 (1877); *Ute Indian Tribe,* 521 F. Supp. at 1081-83. Indeed, it was not until 1948—more than a decade after the allotment policy was abandoned—that Congress "uncouple[d] reservation status from Indian ownership." *Solem,* 465 U.S. at 468. Thus, the Congresses that passed the surplus land Acts likely would have been of the view that unallotted lands would cease to be Indian lands (and therefore part of any reservation) at the moment they were sold to non-Indians, if not earlier. See *Pittsburg & Midway Coal Mining Co. v. Yazzie,* 909 F.2d 1387, 1394 (10th Cir.), cert. denied, 498 U.S. 1012 (1990) ("The most obvious reason for congressional failure to distinguish between title and boundary (jurisdictional) interests is that Congress did not see a distinction and *thought that both interests terminated when either one did* * * *.") (emphasis added). Notwithstanding this history, the Court has "never been willing to extrapolate * * * a specific congressional purpose of diminishing reservations with the passage of every surplus land Act." *Solem,* 465 U.S. at 468-69. This background nevertheless makes clear that any lack of precision on Congress's part should not be fatal to a finding of disestablishment.

430 U.S. at 592), moreover, was not abandoned in the 1903, 1904 and 1905 Appropriations Acts, which did not revoke or alter the 1902 Act's operative language but merely extended the deadline for opening the reservation and made other procedural changes.

The 1902 Act, of course, was not Congress's first surplus land Act directed at the Uintah Reservation. As explained above, in 1888 Congress removed the small mineral-rich area known as the Gilsonite Strip from the reservation. Act of May 24, 1888, ch. 310, 25 Stat. 157. Significantly, both the stated purpose and the operative language of the 1888 Act mirrors that later used by Congress in 1902; the Gilsonite Strip was "declared to be public lands of the United States and restored to the public domain." *Ibid.* In 1894 Congress sought to further diminish the Uintah Reservation, authorizing a commission to negotiate with the Utes for "the relinquishment to the United States of the interest of said Indians in all lands within said reservation not needed for allotment in severalty to said Indians * * *. Act of Aug. 15, 1894, ch. 290, 28 Stat. 286.

When the 1894 Commission's mission was delayed by negotiations with the neighboring Uncompahgres, Congress authorized the creation of a new commission in 1898. Act of June 4, 1898, ch. 376, 30 Stat. 429. Here again, a stated purpose of the 1898 Act was "to obtain the cession to the United States of all lands within [the Uintah Indian Reservation] not * * * allotted." *Ibid.* Similarly, the new commission was explicitly directed to seek the Utes' agreement to "the cession to the United States" of all unallotted lands within the reservation. *Ibid.* The 1898 Commission was, however, unable to gain the Utes' consent. Each of these three Acts indicates that Congress had in mind the diminution of the Uintah Reservation. Indeed, no one disputes that the reservation was diminished by the 1888 Act.

The 1902 Act carried forward Congress's "unmistakable baseline purpose" to diminish the Uintah Reservation. *Rosebud*, 430 U.S. at 592. Once again, the 1902 Act provided for the allotment of Uintah Reservation lands with the consent of a majority of adult male Utes. Act of May 27, 1902, ch. 888, 32 Stat. 245. The Act also directed that allotments be made by October 1, 1903. *Ibid.* And, in words virtually identical to those of the 1888 Act diminishing the reservation by removing the Gilsonite Strip, the Act mandated that after October 1, 1903, all unallotted lands "shall be restored to the public domain." *Ibid.* Unallotted lands "so restored to the public domain" were then to be sold, with the proceeds used first to reimburse the United States for monies advanced to the Indians and second "for the benefit of [the] Indians," as directed by the Secretary of the Interior. *Ibid.*[15]

Both petitioner and the United States, however, urge this Court to disregard this unequivocal evidence of Congress's "baseline purpose" to alter the boundaries of the Uintah Reservation. In essence, they suggest that various extensions of time and other procedural provisions enacted by the Appropriations Acts of 1903, 1904, and 1905 represented an abandonment by Congress of its previous plan to diminish the Uintah Reservation. Essentially urging this Court to view the three Appropriations Acts as entirely distinct from the 1902 Act, the Solicitor

[15] Among other things, the 1902 Act also appropriated $70,064.48 "to be paid to the Uintah and the White River tribes of Ute Indians" when a majority of the adult males consented to both "the allotment of lands and the restoration of the unallotted lands within said reservation as herein provided." Act of May 27, 1902, ch. 888, 32 Stat. 245. One month after passing the 1902 Act, Congress amended it by passing a Joint Resolution which, among other things, directed that the $70,064.48 appropriated for payment to the Utes be paid out "without awaiting their action upon the proposed allotment * * * *and the restoration of the surplus lands to the public domain.*" J. Res. 31, 57th Cong., 1st Sess., 32 Stat. 744 (1902) (emphasis added).

General stresses (1) the absence of restoration-to-the-public-domain language in the 1905 Appropriations Act, and (2) the fact that the Utes ultimately did not consent to the diminishment, as was contemplated in the 1902 Act. U.S. Br. 16-20. These arguments are meritless.

To begin with, it is simply impossible to view the 1903, 1904 and 1905 Appropriations Acts as wholly separate and independent of the 1902 Act. See generally J.A. 44-57. Every one of the later Appropriations Acts extends the original deadline first set in the 1902 Act. Moreover, like the 1902 Joint Resolution, *all* of these Acts make explicit (and often repeated) reference to the 1902 Act. A stated purpose of both the 1903 and 1904 Acts, for example, was to "carry out" the "purpose" or "purposes" of the 1902 Act. Act of Mar. 3, 1903, ch. 994, 32 Stat. 982, 997-998; Act of Apr. 21, 1904, ch. 1402, 33 Stat. 189, 207-08. Similarly, in the 1905 Act Congress specifically provided that "[t]he proceeds of the sale of such [unallotted] lands shall be applied as provided in the [1902 Act], *and the acts amendatory thereof and supplementary thereto.*" Act of Mar. 3, 1905, ch. 1479, 33 Stat. 1048, 1069-70 (emphasis added). As the highlighted language demonstrates, the Congress that passed the 1905 Act clearly viewed the 1902 statute as the basic legislation upon which subsequent Acts were built.

The interconnection of these statutes is confirmed by President Roosevelt's July 14, 1905, proclamation opening the unallotted lands to settlement as of August 28, 1905, which began:

> Whereas it was provided by the Act of Congress, approved May 27, A.D., 1902 (32 Stat. 263), among other things, that on October first, 1903, the unallotted lands in the Uintah Indian Reservation, in the State of Utah, 'shall be restored to the public domain * * *.'
>
> And, whereas, the time for the opening of said unallotted lands was extended * * * by the Act of

> Congress approved Mar. 3, 1903 * * * and * * * by the Act of Congress, approved Apr. 21, 1904 * * * and * * * by the Act of Congress, approved Mar. 3, 1905 * * *.

Presidential Proclamation of July 14, 1905, 34 Stat. 3119. Clearly the President understood the 1902 Act as bringing about the opening of the Uintah Reservation, with the 1903, 1904 and 1905 Acts merely extending the time when that opening would occur. A similar Executive Order was held to be evidence of an intent to diminish the reservation at issue in *Rosebud*. 430 U.S. at 602-03. In that case, as in this one, the President noted both that the Indian tribe had relinquished the lands, and that the lands were open to settlement only under the homestead and town-site laws.

What is more, the 1905 Act simply cannot sensibly be read without the 1902 Act. The 1905 Act lacks a great many features that are required to make it at all meaningful—features that can be supplied only by the 1902 Act. The 1905 Act makes no provision whatever for the allotment of land to the Utes, but merely refers to the remaining "unallotted lands"; it likewise makes no mention of the amount of land to be allotted to the Indians; it sets no price for the lands that are opened for settlement; and it makes no reference to what will be done with the proceeds of the sale of unallotted lands. *All* of those matters are spelled out in the 1902 Act. As the Utah Supreme Court explained in *Perank*, "in enacting the 1905 Act, Congress acted on the premise that the provisions of the 1902 and 1903 Acts and the 1902 Joint Resolution continued in effect." J.A. 55.[16]

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[16] A number of other courts have reached the same conclusion, holding that the lands in question were "restored to the public domain" under the 1902 Act, with the 1905 Act merely extending the deadline and working other minor changes. See *Hanson v. United States*, 153 F.2d 162, 162-63 (10th Cir. 1946); *United States v. Boss*, 160 F. 132, 133 (D. Utah 1906); *Uintah and White River Bands of Ute Indians v. United States*, 139 Ct. Cl. 1, 21-23 (1957); *Sowards v. Meagher*, 108 P. 1112, 1114 (Utah 1910).

Nor does the fact that Congress failed to repeat the operative restoration language in 1905 make any difference. Congress had no need to do so. The 1902 Act had clearly indicated the impact of the allotment plan on reservation boundaries in language "precisely suited" to communicate Congress's intentions. Petitioner and his supporting *amici*, however, argue that the 1905 Act charted a new course concerning reservation boundaries, and that this is demonstrated by the presence of a single sentence in the 1905 Act providing that the unallotted lands "shall be disposed of under the general provisions of the homestead and town-site laws of the United States, and shall be opened to settlement and entry by proclamation of the President." Act of Mar. 3, 1905, ch. 1749, 33 Stat. 1048, 1069-70.

This argument lacks merit. The 1905 Act in no way purports to amend the operative "restore to the public domain" language. Petitioner thus is reduced to arguing that the above-quoted "homestead and town-site" provision is incompatible with diminishment and so sets aside the 1902 Act *sub silentio*. This argument, however, is hard to square with the fact that the 1902 Act itself mentions (and thus foresees) that persons will "enter[]" the unallotted lands "under the homestead law." Act of May 27, 1902, ch. 888, 32 Stat. 245. Compare Act of Mar. 3, 1905, ch. 1479, 33 Stat. 1048, 1069-70.[17] In any

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[17] By indicating that the manner of entry onto the unallotted lands would be that provided in the homestead and town-site laws, Congress intended to prevent speculators, rather than individual settlers, from grabbing the lands. The legislative history makes this abundantly clear. See S. Rep. No. 4240, 58th Cong., 3d Sess. 30 (1905); 39 Cong. Rec. 1185-86 (1905) (remarks of Rep. Howell). This points up another flaw in petitioner's argument: the language of the 1905 Act that allegedly supplanted the 1902 Act's restoration language had a limited lifespan. After five years, the restrictions on the manner of settlement were to lapse and all unallotted lands that had not been disposed of would "be sold and disposed of for cash," with "[t]he proceeds" to be "applied as provided in the act of Congress of May twenty-seventh, nineteen hundred and

event, the argument is foreclosed by this Court's decisions in *DeCoteau* and *Rosebud*. In the latter case, the Court provided that the lands in question "shall be disposed of under the general provisions of the homestead and town-site laws, and shall be opened to settlement and entry by proclamation of the President." Act of Apr. 23, 1904, ch. 1484, 33 Stat. 254, 257.[18] See also *DeCoteau*, 420 U.S. at 442.

The language of the Act at issue in *Rosebud*, like that of the 1905 Act, merely prescribes the manner of distributing the unallotted lands to non-Indian settlers. The operative language expressing congressional intent to diminish must be found elsewhere—in this case, as in *Rosebud*. In *Rosebud*, article I of the relevant Act provided that the lands in question were "cede[d], grant[ed, etc.]," and article V specified that the ceded lands were to be disposed of under the homestead and town-site laws. The 1902 Uintah Reservation Act restored the unallotted Uintah Reservation lands to the public domain, and the 1905 Act added provisions regulating the means by which

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two, and the acts amendatory thereof and supplemental thereto." Act of March 3, 1905, ch. 1479, 33 Stat. 1048, 1069-70.

[18] Significantly, the Congress that enacted the 1905 Act was aware that it was adopting the very language it had used in the Rosebud Reservation opening, where this Court found a congressional intent to diminish. During the floor debate in the House, Rep. Sherman explained that "the idea" behind the 1905 Act's provisions was "to have such rules and regulations as were prescribed, for instance, in the Rosebud Reservation opening * * *." 39 Cong. Rec. 1183 (1905). The Report of the Senate Subcommittee on Indian Affairs demonstrates the same cognizance of the source of the "homestead and town-site" provisions. See Letter from W.A. Richards, Comm'r, General Land Office, to Secretary of the Interior *reprinted in* S. Rep. No. 4240, 58th Cong., 3d Sess. 15 (1905) ("The provisions of this bill prescribing the manner in which the lands are to be opened are similar to the provisions under which the Rosebud Indian Reservation * * * [was] opened during the past year."); see also Letter from E. A. Hitchcock, Secretary of the Interior to The President of the United States, *reprinted in* 39 Cong. Rec. 1184 (1905). This history, of course, strongly suggests that Congress meant to diminish the Uintah Reservation.

settlers could claim and purchase the lands on the diminished reservation. In clear contrast, the Act at issue in *Mattz v. Arnett* contained similar language opening the disputed lands to settlement under the homestead laws, but no operative language indicating a congressional intent to change reservation boundaries. Act of June 17, 1892, ch. 120, 27 Stat. 52.

Finally, petitioner and the United States are mistaken in suggesting that the restoration ordered by the 1902 Act somehow never occurred because the Utes never gave their consent to a diminishment, as was contemplated in the 1902 Act. To be sure, Congress in 1903 did eliminate the requirement of consent to allotment, specifically instructing the Department of the Interior to

> send an inspector to obtain the consent of the Uintah and White River Ute Indians to an allotment of their lands as directed by the act of May twenty-seventh, nineteen hundred and two, and if their consent, as therein provided, can not be obtained by June first, nineteen hundred and three, *then the Secretary of the Interior shall cause to be allotted* to each of said Uintah and White River Ute Indians the quantity and character of land named and described in said act * * *.

32 Stat. 982, 997 (emphasis added). In deliberately removing the 1902 Act's consent requirement, however, Congress acted not in capitulation but out of empowerment. Only two months before the 1903 Act was passed, this Court issued its decision in *Lone Wolf*, holding that Congress may alter reservation boundaries without tribal consent. *Lone Wolf* was, and is, a landmark decision, and it did not escape Congress's notice. See J.A. 49-50; see also *Rosebud*, 430 U.S. at 587-88, 594, 598. Thus, as petitioner himself at one point concedes (Pet. Br. 37 n.21), in amending the 1902 Act in 1903 "Congress understandably relied on this holding as authorizing it to diminish unilaterally the Reservation boundaries." *Rosebud*, 430 U.S. at 594. After the 1903 Act, Congress

expressed no further concern with the presence or absence of tribal consent to the allotment of the Uintah Reservation.

In sum, the 1902 Act's operative language unambiguously diminished the Uintah Reservation, and that baseline purpose was not altered by subsequent Acts.[19] There may be room to question whether Congress's action was wise; the Court has observed, in assessing surplus land Acts from this period in our history, that "much has changed since then, and if Congress had it to do over again it might choose a different course." *Rosebud,* 430 U.S. at 615. Nevertheless, the Court also has made clear that its "task" in these cases is the "narrow one" of discerning the intent of the contemporaneous Congress: the Court "cannot remake history." *DeCoteau,* 420 U.S. at 449. Here, Congress's intent to diminish is clear.

CONCLUSION

The judgment of the Utah Supreme Court should be affirmed.

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[19] The United States also contends that "the absence of a specific statutory description of the land * * * removed from the Reservation" weighs against a finding of diminishment in this case. U.S. Br. 20 n.28. Yet it is difficult to imagine how Congress *could* have provided a specific description of the relinquished lands, while at the same time permitting the Indians first to select their allotments. Not surprisingly, the cessions in *DeCoteau* and *Rosebud,* like the boundary alterations here, were limited to land remaining unallotted after the Indians had their choice. Thus, the Solicitor General is simply mistaken in claiming that "[i]n *DeCoteau* and *Rosebud,* the relevant statutes precisely described the areas that were found to have been removed from [the] reservation." *Ibid.* See *DeCoteau,* 420 U.S. at 439 & n.22 (quoting Act of Mar. 3, 1891, 26 Stat. 1036); *Rosebud,* 430 U.S. at 597, 607, 613. In *Rosebud,* of course, the 1904, 1907 and 1910 Acts did set forth boundaries within which the unallotted lands to be ceded were located, but the obvious reason for including those boundaries was to make clear that Congress was legislating with respect to only a part of the Sioux Reservation.

Respectfully submitted,

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